**R. H. Macy & Co., Inc. *and* Anthony A. Patti *and* Local 1-S, Department Store Workers' Union, Retail, Wholesale, Department Store Union, AFL-CIO.** Cases 29-CA-7399, 29-CA-7676, and 29-CA-7664

16 August 1983

## DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 30 November 1981 Administrative Law Judge Julius Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief to Respondent's exceptions, and the Charging Parties filed an answering brief, cross-exceptions, and a brief in support of cross-exceptions. Respondent filed a brief in answer to the Charging Parties' cross-exceptions.

Subsequently, on 8 June 1982, the Board issued an Order Remanding Proceeding to the Administrative Law Judge for the purpose of reopening the record to permit Charging Party Anthony A. Patti to cross-examine Supervisor Joel Steinberg, and for any further proceedings that might be required as a result of that cross-examination. On 8 November 1982 Administrative Law Judge Cohn issued the attached Supplemental Decision reaffirming the findings and conclusions made in his original Decision relating to the allegations concerning the unsatisfactory review of Patti and the failure to give him a pay increase in 1979. No exceptions to the Supplemental Decision were filed.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In the absence of exceptions thereto, we adopt, *pro forma*, the Administrative Law Judge's dismissal of the complaint allegation relating to interrogation of employees by Supervisor Mary Gillespie.

Member Hunter agrees with the Administrative Law Judge's dismissal of the allegation but, in doing so, finds it unnecessary to pass on the Administrative Law Judge's observation that "there can be no interrogation without a question." In addition, in light of the record as a whole, Member Hunter is not persuaded that the General Counsel has met his burden with respect to the allegation of unlawful surveillance over employee activities. Accordingly, he would dismiss this complaint allegation. Cf. *Comar Glass Co.*, 244 NLRB 379 (1979).

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, R. H. Macy & Co., Inc., Roosevelt Field, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

## DECISION

### STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge: This case was tried at Brooklyn and New York, New York, on October 30 and 31, 1980, and January 29 and 30 and April 20, 1981. Upon a charge filed on August 9, 1979, in Case 29-CA-7399, the Regional Director for Region 29 issued a complaint on October 17, 1979, alleging that R. H. Macy & Co., Inc., herein called Respondent or Macy's, engaged in certain conduct in violation of Section 8(a)(1) of the Act, and also violated Section 8(a)(3) of the Act by issuing an unduly critical job appraisal to Janet LaVia and giving her a smaller pay increase because of her activity on behalf of Local 1-S, Department Store Workers' Union, Retail, Wholesale, Department Store Union, AFL-CIO, herein called the Union. Thereafter, upon charges filed by the Union in Case 29-CA-7664 on December 26, 1979, and by Anthony Patti in Case 29-CA-7676 on January 2, 1980, the Regional Director issued a consolidated complaint on February 15, 1980, alleging additional violations of Section 8(a)(1) by Respondent, and of Section 8(a)(3) by issuing an unduly critical appraisal of Anthony Patti and refusing to give him a pay increase. By order dated April 3, 1980, the Regional Director futher consolidated all of these cases for hearing. Respondent filed answers denying generally the commission of the unfair labor practices alleged in the complaint.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were submitted by the Charging Parties and Respondent which have been carefully considered. Upon the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF RESPONDENT

At all times material herein, Respondent has maintained a principal office and place of business in the Borough of Manhattan and City and State of New York where it is engaged in the operation of retail department stores. It also operates such stores at various other locations in the States of New York, New Jersey, and Con-

necticut, including a department store located at Roosevelt Field, Long Island, New York, which is the facility involved in this proceeding. During the year preceeding issuance of the complaint herein, Respondent derived from its retail business gross revenues in excess of $500,000 and, during the same period, it purchased and caused to be delivered to its stores in the State of New York goods, merchandise, and other supplies valued in excess of $50,000 directly from firms located outside the State of New York. The complaint alleges, Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. ALLEGED UNFAIR LABOR PRACTICES

### A. *Background*

The Union had been engaged in a recent organizational campaign at Respondent's Roosevelt Field location since October 1978. Pursuant to a representation petition filed in the spring of 1979, an election was conducted in June 1979 among the employees employed at Respondent's auto facility at the Field. This election resulted in a loss for the Union. In the summer of 1979, a committee was established for the purpose of organizing the store employees. Among the committee members were Anthony Patti and Janet LaVia, the two alleged discriminatees involved in this proceeding. In September and October the Union engaged in a campaign of distribution of leaflets at the store entrances, in the mall, and in the parking area. In addition, letters were sent to the employees, the union newspaper was distributed, the leafletting was directed both to employees and to consumers, and occasional meetings were held. As committee members, Patti and LaVia were involved in all of these activities, and, in any case, their activity was well known to their supervisors and Respondent's management, a point conceded in this case. The allegations involved in the complaint refer to matters or incidents occurring during the period of February through December 1979.

### B. *The Alleged Violations of Section 8(a)(1)*

#### 1. Threats of discharge

Janet LaVia, an employee for 17 years in the jewelry department, testified that at some point in early 1979, probably February, March, or April, her supervisor, Sales Manager Russell Hagner, approached her and told her confidentially she should stay away from the Union, they did not want the Union in the store, and she should be very careful. Nothing else was said at the time and Hagner denies saying these things at any time.

However, Hagner testified that he did call LaVia to his office one morning after he had been informed the previous evening by two employees that LaVia had approached them, asked that they sign union cards, and also described some of the benefits of the Union. Hagner advised LaVia of this and said he wanted to tell her the company policy regarding solicitation. Hagner told LaVia she was not allowed to solicit on company time although what she did on her own time was her own business. Hagner stated that LaVia replied she did not know what he was talking about and he said he just wanted to let her know what the company policy was and make sure she understood it. She said that she did understand.

No contention is made by the Genral Counsel concerning the conversation described by Hagner in which he explained the Company's policy concerning solicitation. The allegation is simply with regard to the so-called confidential conversation as described by LaVia and denied by Hagner. I find nothing in Hagner's demeanor to warrant doubting his credibility in this matter and, as LaVia's allegation is not corroborated in any other manner, I find that the General Counsel has not established by a preponderance of the proof that Respondent violated the Act as alleged. As no evidence was adduced concerning a further allegation that Respondent, by Hagner, threatened employees with discharge in July 1979, I shall therefore dismiss the allegations in the complaint concerning threats of discharge by Hagner.[1]

The complaint alleges further that Respodent violated Section 8(a)(1) by the conduct of Lorraine Smith, a supervisor, in threatening employees with discharge. At the hearing I granted a motion to dismiss that allegation for lack of evidence and herein reaffirm my ruling.

Finally, it is alleged that Respondent violated Section 8(a)(1) by threatening and warning employee Anthony Patti because he posted a union notice on a bulletin board. This will be better discussed hereafter in connection with the complaint allegation concerning employees' use of bulletin boards.

#### 2. The allegations of surveillance

The General Counsel has alleged several instances of surveillance of employees' activities by security guards employed by Respondent. Paul Genovese, an employee, testified that in August 1979 he and another employee, Shirley Williams, were followed by a security man named Joe while going to lunch at Lorry's in the mall. Genovese said that Joe went to the doorway of the restaurant, looked in, and walked away. Genovese said that, at the end of the day after clocking out, he and Williams were walking to the parking lot and noticed Joe following them through the mall and into the parking lot. Genovese said that, after he got into his car, he noticed Joe walking back towards the mall. Williams did not testify specifically about the lunch portion of this incident, but did state that a security man, named Joe, followed her and Genovese to the parking lot and she heard Joe reporting that she was getting into her car and leaving the lot. The security person referred to, Joe, did not testify at the hearing. The only witness for Respondent on these matters of surveillance was the head of security, LaRocca, who did not testify specifically about this inci-

[1] The General Counsel did not challenge the validity of the no-solicitation rule of Respondent, nor did LaVia, or any other witness on behalf of the General Counsel or the Union, testify concerning the conversation Hagner described with LaVia.

dent but did state that he had never directed any security people to engage in this type of surveillance. I find Williams, in particular, and Genovese, to be credible witnesses and, while their testimony concerning this incident was not exactly the same in detail, the substanitally corroborated one another I do not find that the fact Genovese did not refer to Joe reporting back on their movements in his testimony makes their testimony so inconsistent as to be incredible. As it is conceded that Genovese and Williams were members of the Union's organizing committee and were active on its behalf, information well known to Respondent, I find that, by following these two employees to the parking lot and their cars, the security agent, Joe, engaged in an act of surveillance of their activities and thereby Respondent violated Section 8(a)(1) of the Act.[2]

The principal allegation of surveillance by the General Counsel relates to a lunch at Lorry's, a nearby restaurant on the mall, which was attended by Genovese, LaVia, Williams, Patti, and Sussman, the union organizer. This luncheon which occurred in mid-1979 was observed by a number of security guards of Respondent, according to testimony of witnesses for the General Counsel. However, despite the fact that I do not place great weight upon the exactitude of dates, particularly where they are not significant, nor on the correct number of people attending a certain incident, I find the various versions of this alleged occurrence are so wide apart that I must conclude the General Counsel has failed to prove by a preponderance of the evidence that unlawful surveillance was conducted as alleged.

Thus, Genovese testified that in August he and Shirley Williams were followed by a security man named Joe on their way to lunch at Lorry's. Genovese said this security man came to the doorway of the restaurant, looked inside, and left. Williams testified to a luncheon also in August when she was with Sussman, LaVia, Patti, and Richard Moore, an organizer for the Union. She stated that she was followed by LaRocca, head of security, who was joined by a security woman, Jean, and a man named Bob, and that they just walked through the luncheonette and acted as though they were looking for somebody. LaVia testified she and the other employees, called the core group, were followed on many occasions. She said this occurred during the spring of 1979 and included herself, Genovese, Patti, and Williams. Presumably referring to the incident in question, she said they were followed on their way to lunch at Lum's, a restaurant in the mall. LaVia stated that four members of the security department, including LaRocca, observed them going down the mall from Macy's to Lum's, which is about the distance of a city block, for lunch. Patti testified to an incident occurring about July 13 in which he went to lunch at Lorry's with Shirley Williams and others from the core group. He said he looked out the door and saw Jean Reo, a security person, looking into the restaurant. He stated that, when they were finished with their lunch and went out, he saw LaRocca and his supervisor, Joel Steinberg, standing there. He said he heard LaRocca say, "Oh, there he is."

It is not clear whether the testimony of these four employees regarding a luncheon alleged to be kept under surveillance by Respondent refers to one or more incidents. If the General Counsel had in mind a particular single luncheon engagement as illustrative of the conduct of Respondent in this regard, then it appears there is a disparity among the witnesses with respect to time, place (LaVia testified that it occurred at Lum's and did not mention Lorry's), and the identity of the employees who were in attendance, as well as the security guards who are alleged to have observed them. While, as noted, four witnesses to an occurrence will frequently describe it with some variations, it is expected that their testimony be substantially the same with respect to the principal allegations. In this instance the testimony is quite far apart as to the items described above. On the other hand, if the combined testimony of these witnesses refer not to one but to more than one occasion, then none of them corroborated one another although they had an opportunity in their testimony to do so. Such a presentation has not been made and, accordingly, I shall dismiss the complaint allegation of surveillance insofar as it refers to observation of employees during lunch breaks.

Patti testified concerning another incident alleged by the General Counsel to be illegal surveillance. He said that on June 22, 1979, he met Sussman, the union organizer, outside the store at lunchtime. Patti said Sussman was handing out material to employees and Jean Reo, a security person, was standing there watching him. Sussman suggested they move to a more private place and as Patti went along he noticed Reo picking up her bag and speaking into it. They went about 100 feet from Respondent's entrance, still inside the mall, and sat down on a bench. He observed Reo and two other security people sitting about 50 feet away at a table belonging to Lum's Restaurant. Patti stated that the security people just sat there with their arms folded looking straight at him and Sussman, and were not themselves ordering any food. He and Sussman remained until 5 minutes before the end of his lunch hour, when he got up and returned to the store. Neither Reo nor any other security employee testified concerning this incident. Assuming the truth of Patti's testimony, I find no merit to the General Counsel's allegation of unlawful surveillance. The Board has held that inspection by Respondent of open union activity in front of its property does not constitute surveillance.[3] In this instance Patti has described talking to a union organizer in an open public area such as the mall in which Respondent's store is located. Accordingly, I shall dismiss this allegation of surveillance.

[2] I find no merit to Respondent's contention that, assuming Joe had indeed engaged in this conduct, he was not acting as an agent of Respondent because he had not been instructed or authorized to observe Williams and Genovese. There is no denial by Respondent that Joe was a security employee. The activity in which he engaged was within the scope of a security employee's employment, and, even if he were not specifically ordered to do so, Respondent is responsible for his conduct. Moreover, Joe did not testify and I do not credit LaRocca's blanket denial in the absence of specific factual testimony as to this incident.

[3] See *ITT Automotive Electrical Products Division*, 231 NLRB 878 (1977).

3. The alleged impression of surveillance

Shirley Williams testified that in April 1979 she signed a union card and mailed it, and immediately thereafter began distributing union leaflets outside the employees' entrance to the store. She also stated she generally spoke to the union organizers outside the store before it opened. One morning in April after she had just come into work, her supervisor, Val Ferreira, told her that Blond, store manager, wanted her to make sure she told Ferreira of her whereabouts at all times. Williams testified that the policy of the store had been for a salesperson working at a counter to tell whoever else was there or available in the area that she was going to the ladies room or whatever, just so long as they knew where an employee was and there was coverage on the counter. Williams further testified she demanded that Ferreira tell other employees the same thing or else she would complain to personnel. After that Ferreira also spoke to Dorothy Manfry, a coworker. Ferreira testified that Store Manager Blond visited the department one day in April, and, being a stickler for customer service and making certain that the counters were manned, asked him where Williams was. He then remonstrated with Ferreira telling him he was to know at all times the whereabouts of his people. Ferreira said he then told Williams that Blond wanted him to know where his people were all the time. Ferreira finally stated he told the same to Manfry right after speaking to Williams, and during the course of the day spoke to the rest of his people, delivering the same message to them.

The accounts by both Williams and Ferreira of this transaction are not dissimilar, but I shall assume the version of Williams, and find that, whatever else may be gleaned from it, it is not an unlawful impression of surveillance, the only contention urged by the General Counsel. Basically, there is nothing in this conversation which refers to the employees' union activities or how Respondent knew of them. Even if we were to infer Ferreira's direction to Williams that she advise him of her whereabouts resulted from Respondent's knowledge of her union activities, the Board has held that "generalized statements to employees, which are not directed at any employee's organizing activities, are insufficient to create the impression of surveillance," and, further, particularly if such remarks are "based on public observations which are not themselves unlawful."[4]

4. The allegation of unlawful interrogation

Shirley Williams testified that, one day in August after she had been leafletting and while she was working, Mary Gillespie came to her counter, mentioned she had seen Williams leafletting outside, and told her if there was anything she was dissatisfied about or anything she wanted to know about the Union to feel free to come back and talk to her about it. Williams replied that it was not necessary. Gillespie, who at the time had been sales manager in cosmetics, said concerning this conversation that she had gone to the counter and told Williams she was available and, if she had any question concerning the Union, she would be more than glad to answer and, if she did not know the answer, she would find out.

Respondent's contention that there can be no interrogation without a question is well taken. Williams' activity with respect to leafletting was out in the open and public knowledge, and, in any case, Gillespie merely told Williams that she was free to talk about anything with her about it. I find in the circumstances that the General Counsel has not established any interrogation, unlawful or otherwise, and therefore shall dismiss that allegation contained in the complaint.

5. The alleged discriminatory use of the company bulletin boards

Lorraine Smith, personnel manager, testified there were six bulletin boards in the store, three in the time-clock area, one in the women's lounge, one in the men's lounge, and one in personnel. She stated there had been, at least until December 1980, an unwritten policy that employees were not permitted to post material on the bulletin boards. She said that, while there was no writing, the policy had been communicated to employees and, if one asked to put something on a board, they were told the boards were restricted for company business. Moreover, if a notice was posted without permission, it was removed by the personnel department. Smith averred that the boards were utilized to communicate with employees, and to that effect legal documents dealing with minimum wage requirements were posted, as were training information, employee benefit changes, and notices of company-sponsored activities. In addition, Smith said the boards were utilized for posting of cards and notes sent by employees which Macy's wished to publicize—cards relating to retirement, illness, hospitalization, and death in the family. However, Smith stated, employees who asked to place notices of union meetings, or those of churches or political clubs, would not be permitted to do so, nor would she permit them to place notices of a social party or sale of an automobile. Indeed, this was the manner in which the rule was communicated to the employees; that is, when they asked and were refused permission. Finally, Smith pointed out that any of these unauthorized types of notices, including union and other types of meetings and sales of cars, were taken down immediately after she or any other member of the personnel department became aware of the posting of such notices. And, of course, when an employee specifically requested her for permission to post such a notice, it was refused.

Employee witnesses testified to somewhat different effect. For example, Paul Genovese stated he knew of no company policy restricting the use or prohibiting the use of a bulletin board. He said he would see a variety of things, including notifications of different group meetings, employees' notices trying to sell an automobile, or even a home, or thank you letters from someone who was sick. He said he himself never put anything on the bulletin board nor did he take anything down from one. However, he did recall seeing, in the summer of 1979, a Mr. Chiel (a supervisor) taking down a union pamphlet from the bulletin board in the men's lounge.

[4] *Palby Lingerie*, 252 NLRB 176 (1980); *Hedison Mfg. Co.*, 249 NLRB 791 (1980).

Janet LaVia said she had not heard of any company policy relating to the use of bulletin boards, and they were full of personal things like get well cards, parties, farewell dinners, and advertisements for buying and selling. Also she noted that before September 1979 she did see a union notice on the board.

Anthony Patti testified that, at the bulletin board near the timeclock where Macy's posted official messages and government bulletins, a portion of the board was occupied with employees' notices to attend meetings or socials of clubs outside of the store. He said there were also thank you cards and notices trying to sell things of people needing rides or renting houses and the like. He said this had been going on for 24 years. Patti said there was another bulletin board in the men's lounge that contained announcements for concerts, selling cars, church affairs, and so on. Patti stated that at one time he placed a union leaflet on a bulletin board in the men's lounge. This was in December 1979, and on December 6 he also put up a notice, which he himself had written on a piece of paper, announcing a meeting at the Holiday Inn in Westbury, signing his name to it. Shortly after he had done so, while going past the door to the lounge he saw Scher and Chiel walking out with a piece of paper about the size of his notice. He then looked for it and was told by some people on a break that the notice was taken off by them. Patti went after them and told Scher, who was holding the notice, that it was his and he wanted it back on the bulletin board, and that he was entitled according to law to put in on the board. Scher told him he did not know if he was entitled to it but he would check into it. The notice expressly mentioned that it was for a union meeting.

Patti said the next day he put up the leaflet referred to above and, as he was doing so, Joel Steinberg, his supervisor, saw him and told him not to put it up as he was getting a lot of flak about him (Patti) and his union activities. Steinberg said he was putting him on warning for this. Patti replied that this was America and he was entitled by law to put union literature on the bulletin boards, so he proceeded to do it. However, Patti stated he went back and took it down because he did not want to be accused of disobeying a direct order. The next day Patti asked Steinberg whether there was a new warning for him. Steinberg replied that he learned from Scher the bulletin board was not the property of the employees but of Macy's, and that Patti could not put anything on it. Steinberg denied to Patti that he had placed him on warning. Patti stated that thereafter he did not put anything on the bulletin board, and that, while other people did put up union notices, they were removed very quickly and people stopped putting them up. Patti, as did the other employees, testified he was not aware of any prohibition about the use of the bulletin boards.

Shirley Williams testified that on May 10, 1979, she posted a notice on the bulletin board advertising her 1974 Chevrolet for sale for $2,400, leaving her name and extension number on the paper. She stated this notice remained on the bulletin baord for 10 days before she sold the car to a woman in security and then she personally took down the notice. She specified that her notice was posted on the bulletin board alongside the timecards and, at the time, there were other notices on the board concerning such matters as apartments for rent, kittens for adoption, a boat for sale, and the like. Williams stated that, during the time her automobile notice was posted, no one had told her about a company policy against such practice or that an employee had to go through personnel before posting. Williams also said that, after her experience with the car notice, she had posted two or three union notices on the bulletin board but observed they were gone within 15 minutes after she had posted them. I found Williams, who is no longer employed by Respondent, to be a direct and forthright witness and I credit her testimony.

Clearly an employer need not grant employees the right to post notices or use company bulletin board with regard to their attempts to organize a union or any other union activities.[5] Respondent has stated it had a long-established policy prohibiting employees from using its bulletin boards for any other purpose. Although Respondent has written rules and regulations, it concedes that the bulletin board policy was unwritten. Indeed, employee witnesses testified they were unaware of any such policy. However, assuming such policy in fact existed, we are then faced with the issue as to whether the rule has been discriminatorily applied. The facts related above with respect to the use of the bulletin boards do not reflect any great dispute. Respondent has not set forth any evidence to deny that union notices posted in December 1979 by Patti were not removed by its Supervisors Scher and Chiel. Employee witnesses have testified to a variety of nonemployer or nonbusiness-related notices appearing on the bulletin boards. Smith, the principal witness for Respondent in this matter, concedes that such notices may have been posted without permission, but merely stated they were removed by her or her assistants as soon as they became aware of their existence. The credited testimony of Williams shows that a notice for the sale of her automobile was posted for a period of 10 days before she herself removed it, having sold the vehicle. The fact that her notice gave her store telephone extension number, in itself a violation of a written rule, is not probative of the fact that her notice could not have been posted, and remained for a period of 10 days, as urged by Respondent. On the other hand, Respondent has not submitted evidence from Scher and Chiel to deny Patti's testimony that his posted notice concerning a union meeting was removed very shortly, within a matter of minutes, after he posted it. In such circumstances, I find that, by treating the posting of the union notice of a meeting different from other types of material posted on the bulletin board, and therefore discriminatorily, Respondent violated Section 8(a)(1) of the Act.[6]

There remains for consideration on this issue of bulletin boards whether Respondent violated the Act by threatening Patti for attempting to use the bulletin boards to post union leaflets in December. In his testimony, Joel Steinberg, the visual merchandise manager of the store and Patti's supervisor, denied he had put Patti on warning for posting union material without permission, and

[5] *North Kingstown Nursing Care Center*, 244 NLRB 54, 65 (1979).
[6] *Continental Kitchen Corp.*, 246 NLRB 611 (1979).

also denied he told Patti he was getting flak because of Patti's union activity. In view of the fact that Patti was already on warning as a result of Steinberg's evaluation of him the previous October 1, I would be inclined to credit Steinberg's denial that he discussed a warning with Patti. However, Steinberg did state he had discussed Patti's rights and told him he had no authority to put leaflets on bulletin boards which are Macy's property, and, further, the next morning he told Patti in his office if he did it again he would turn him over to higher authority. Interestingly, Steinberg testified he was not aware of any company policy that restricted the use of the bulletin boards and prior to December 1979 he had personally observed notices of items for sale or announcements of one kind or another on bulletin boards in the store. Since the restrictive bulletin board policy, if it did exist, was discriminatorily applied, I find that Steinberg's telling Patti he would refer him to higher authority in the event he posted a union notice on the bulletin board constituted a threat of discipline and thereby Respondent further violated Section 8(a)(1) of the Act.

C. *The Alleged Violations of Section 8(a)(3)*

1. Janet LaVia

It is alleged that, because of her union activities, LaVia was given a job review evaluation in 1979 containing one marginal rating causing her annual salary increase to be set at a figure less than the average increase received by selling employees in that year. LaVia had been employed for 17 years as a salesperson in the jewelry department of the store, and is still so employed. Her union activity has been previously noted and, in view of her membership on the union negotiating committee, having in that capacity signed letters and leaflets which were distributed to employees, and other activities, there is no question that Respondent knew her to be a union adherent.

LaVia received her review and an $8-per-week increase in June 1979. LaVia said that in February of that year she had asked Hagner, her supervisor, what kind of review she was going to get and if the money was good. He told her not to worry, it was an excellent review and a good raise. Although her review was due in April it was held up for several months because she was told that the supervisors were very busy. She had approached Hagner often asking where it was, and the last time she spoke to him he said he had to rewrite the review. LaVia said she received the review in July (actually it was June); it was unfavorable and set forth that she was bossy, influenced coworkers, slammed drawers, and refused to flex. LaVia said Hagner told her he had been directed by personnel to rewrite it. LaVia accused Hagner of signaling her out because of her union activity.

Hagner testified he first reviewed LaVia in May 1978 after he had been on his job only a short time. The previous manager had prepared a review for LaVia which was marginal, containing no raise. He spoke to LaVia, who told him she did not have a good relationship with the previous manager, and he asked whether she would have a good attitude if he gave her a good review. LaVia agreed and he prepared a good review with a raise of $14 after consulting with the job review manager, Roggeman. Hagner stated he did speak to LaVia in March 1979 concerning her review but only told her they would sit down and talk after he prepared it. He said she told him she hoped the review would be a good one because she had worked hard. Hagner denied telling LaVia that the review would be excellent and she would receive a good raise. Hagner said he spoke with her again after Mother's Day in 1979 and told her he was rewriting it because Smith was challenging him on various aspects of the review and he was changing it. According to both Hagner and Smith, the review was being rewritten because he had two marginal ratings in it with respect to nonselling duties and lack of cooperation. Smith had challenged him on the nonselling duties aspect of it and he could not substantiate his reasons for rating her marginal in that category, so they decided that the rating should be "good" instead of "marginal." Thus, the review was left with one marginal rating rather than two, and for that reason he had to rewrite it. This 1979 review, which is in evidence, contains a marginal rating in the classification of cooperation which includes accepting direction, accepting constructive criticism, flexibility, ability to work with coworkers, and courtesy and tact with all employees.

Hagner met with LaVia in his office on June 8 and went over the review with her. She said it was unfair, and that she did as much work if not more than other girls in the department. Hagner stated he explained that he was not criticizing her about that but rather it was her attitude. She told him she felt she was getting a bad evaluation because of the Union and he replied that was not correct, it was based on her past year's performance. He also brought in Roggeman to explain it. Roggeman, among other things, told LaVia that she was moody and it brought down her job performance. LaVia then accused Hagner of making a deal with the personnel department to receive a promotion and give her a marginal review because of her union activities. She then walked out.

The records reveal that on five prior occasions when she was reviewed LaVia was placed on warning three times receiving no salary increases, on a fourth review she was rated unsatisfactory for volume of work, and most recently, in 1976, she received an unsatisfactory for nonselling duties and a marginal for her cooperation. In her testimony she did not recall many of these ratings although they are clearly in the record. Actually there are no great differences between the testimony of LaVia and Hagner except the latter's denial that he told her in advance she would receive an excellent review and a good raise. Hagner was a forthright witness and, in view of LaVia's failure to recollect the occasions on which she received less than good reviews, I credit Hagner on this point.

Although this case does not involve an alleged discriminatory discharge of an employee, but rather a discriminatory evaluation and a reduced annual salary increase, nevertheless it is fitting to apply the Board's recently established standards for determining the employ-

er's motivation. Under the Board's approach in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), the burden initially rests on the General Counsel to establish a *prima facie* case by showing that the protected employee activity was "a motivating factor" in the employer's decision to institute the action. I find herein that this burden has been met by the General Counsel by reason of LaVia's open union activities detailed above concerning which Respondent admittedly had knowledge. These activities commenced in the latter part of 1978 and continued through 1979 during which her annual review was to be conducted. I believe that Respondent had such motivation in view of its vigorous campaign to keep the Union out of the Roosevelt Field store. However, under the *Wright Line* approach, the burden of going forward shifts to an employer to demonstrate that it also had a legitimate business motive for its conduct and that it would have instituted such action even absent the protected activity. I find that Respondent has met this burden.

Thus, LaVia's past record indicates similar evaluations and, indeed, warnings for basically the same reason she was given one marginal rating on her 1979 review. These prior appraisals go back prior to the advent of the recent union organizational campaign or any activity in which LaVia was engaged. Most important, I note also that the factors relied upon by Respondent in detailing the appraisal as to the area of "cooperation" are not in any manner denied by LaVia or any other witness for the General Counsel. Her argument was based on the fact that she was a good salesperson in the sense that her volume of sales was good, a point agreed to by Hagner and her supervisors. Although an evaluation of an employee's performance based upon personal observation may frequently be determined by subjective practices, Hagner was able to point out certain areas in this category in which he found LaVia to be deficient. I find therefore that Respondent has avoided the General Counsel's *prima facie* case by showing that it would have instituted the action even absent the protected employee activity and that a violation of the Act has not been established by a preponderance of the evidence. 251 NLRB at 1088–89. Accordingly, I shall dismiss the allegations of the complaint relating to the alleged unlawful withholding of a sufficient wage increase to LaVia, and the marginal rating given her on her annual review.

### 2. Anthony Patti

The allegation here is almost the same as in the case of LaVia; that is, Patti was given a very poor rating on his evaluation, he was denied any wage increase at all, and, indeed, he was placed on warning because of his union activities. Patti has been employed as a display man for 24 years, and Joel Steinberg has been his supervisor for the past 4 years. Patti signed an authorization card for the Union on November 29, 1978, and during the following spring distributed cards to employees of the auto center who were involved in an organizational campaign at that time. Patti later took part in the distribution of leaflets to the store employees and in addition obtained authorization cards from employees during at least the fall of 1979. Patti was also a member of the organizing committee and clearly his activities on behalf of the Union were known to Respondent.

Patti received his annual review on October 16, 1979. In the four major areas reflecting performance, Patti was rated by Steinberg as unsatisfactory with respect to quantity of work and cooperation and marginal as to quality of work and business contacts. This resulted in Patti's being placed on warning with an update review to be conducted in 6 months and, of course, he received no wage increase. Patti complained to Steinberg, who told him that he was not only slow in his work but actually devious in that he would pursue methods that would only make his performance even slower. Steinberg also told him that he made a lot of mistakes and that the managers were not satisfied with his work. Patti then complained to Lorraine Smith, the personnel manager, who, according to Patti, told him that he would have to cooperate more with Steinberg and try harder. Patti stated that in his conversations with Steinberg and Smith there was no mention of the Union, but changed this response and said he asked Smith why she had to throw the book at him and whether it was caused by his union activity. He also mentioned that security people were watching him and the core group and she replied that this was ridiculous.

Steinberg stated he gave an unsatisfactory review to Patti in 1979, and would have done so in 1978, but he did not have the corroboration, not having taken notes that year. He did so in 1979 and that of course resulted in the review described above. Steinberg stated that Patti's work was sloppy; he was argumentative with the floor people and more difficult to begin with. His productivity became less and less. At times Steinberg or his assistant would attempt to help but his assistant told him he could not work any longer with Patti. The same occurred with other people whom he sent to work with and assist Patti.

The record reveals a long list of reviews and appraisals going back over 20 years. During that period of time Patti frequently received unsatisfactory or marginal ratings, and, despite the fact that it was company policy to award merit increases at the time of the job review, frequently Patti did not receive any increase at all. With regard to the last few years before 1979, the 1978 review has already been noted. In addition, in 1977 Patti received two marginal ratings but was awarded an $8 increase, and he received marginal ratings in some categories in 1976 and 1975. In 1974 Patti received an unsatisfactory rating.

Applying the same rationale and approach to this allegation as in the case of LaVia, as a result of Patti's involvement in union activities over a period of time and Respondent's knowledge thereof it would have sufficient motivation to have given Patti the unsatisfactory review which he received. However, I find that Respondent has established ample reason by way of Patti's overall work performance to warrant the unsatisfactory review and warning which he did receive in October 1979. In this connection I note that Patti had a long record of subpar performance, none of which has been effectively denied, nor has any evidence been submitted that would negate

Respondent's reasons for the poor evaluation in 1979. Although I found that Patti was unlawfully threatened in violation of the Act by Steinberg, that incident occurred in December, 2 months after the 1979 performance review. Having found that Responent has successfully rebutted any *prima facie* case put forth by the General Counsel, I shall dismiss the allegation of the complaint concerning the unsatisfactory review and lack of pay increase to Patti in 1979.

### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

### V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by:
(a) Engaging in surveillance of its employees' union activities and other protected concerted activites.
(b) Refusing to permit employees to post union literature and notices on its bulletin boards while permitting the posting of other material and literature.
(c) Threatening employees with discipline because they engage in Union activities.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
5. Except as specifically found herein, Respondent has not otherwise violated the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

### ORDER[7]

The Respondent R. H. Macy & Co., Inc., Respondent Field, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
(a) Engaging in surveillance of its employees' union activities on behalf of Local 1-S, Department Store Workers' Union, Retail, Wholesale, Department Store Union, AFL-CIO, or any other union.
(b) Refusing to permit employees to post union literature and notices on company bulletin boards while permitting the posting of other notices and literature.
(c) Threatening employees with discipline because they are engaging in union activities.
(d) In any like or related manner interering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.
2. Take the following affirmative action to effectuate the policies of the Act:
(a) Post at its Roosevelt Field, Long Island, New York, store copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.
(b) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the consolidated complaints be dismissed with respect to allegations not specifically found to be violative of the Act.

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT engage in surveillance of the union or other protected activities of our employees on behalf of Local 1-S, Deparment Store Workers' Union, Retail, Wholesale, Department Store Union, AFL-CIO, or any other labor organization.

WE WILL NOT refuse to permit employees to post union notices or literature on our bulletin boards while permitting the posting of other notices and literature.

WE WILL NOT threaten employees with discipline because they have engaged in union or other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

R. H. MACY & CO., INC.

## SUPPLEMENTAL DECISION

### STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge: On November 30, 1981, I issued my Decision in this proceeding finding, *inter alia*, that Respondent had not violated Section 8(a)(3) and (1) of the Act by failing to grant Anthony Patti a wage increase and rating his performance unsatisfactory in 1979. Thereafter, by Order dated June 8, 1982, the Board remanded this proceeding for the purpose of reopening the hearing to permit Charging Party Patti, who had not received notice of the resumption of the hearing on April 20, 1981, to cross-examine Supervisor Steinberg, who appeared and testified on that date.

Pursuant to notice, a hearing was held on July 26, 1982. Charging Party Patti appeared on his own behalf and cross-examined Joel Steinberg at length, and the record reveals that he was assisted in this endeavor by counsel for the General Counsel and counsel for the Charging Party Union. All parties were given full opportunity to examine Steinberg and submit other relevant testimony and evidence. Following the close of the hearing, Patti and Respondent submitted briefs which have been duly considered.

Upon the entire record and from my observation of the witnesses, I make the following:

### ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS

After careful consideration of the record containing Patti's cross-examination of Steinberg, I find no new evidence or argument which would cause me to change my original recommendation in this matter. Although the cross-examination conducted *pro se* by Patti is somewhat confusing, no doubt in some measure due to the personalities of these two protagonists, what I glean from the record is reinforcement of Steinberg's prior testimony. In this connection it must be borne in mind that Steinberg's testimony, both original and at the reopened hearing on cross-examination by Patti, is essentially undenied. In any case Steinberg was able to elaborate on the reasons given for the unsatisfactory rating and appraisal of Patti for the year 1979. I have already detailed the history of poor ratings given to Patti by Steinberg and his predecessor supervisors. Moreover, I find nothing sinister, as apparently contended by Patti, in the fact that his prior appraisal for 1978 had been changed and upgraded by Steinberg, on orders from his superior, because it had not been sufficiently substantiated and documented. As Steinberg testified, he thereafter kept notes, and at the reopened hearing he was able to testify in greater detail regarding the two main instances described in the 1979 appraisal as the basis for the unsatisfactory rating among other things.

At the conclusion of Steinberg's cross-examination by Patti, he was also questioned by counsel for the General Counsel and counsel for the Charging Party Union. No additional witnesses were presented by the parties although they, including Patti himself, were given the opportunity to do so.

Accordingly, I find nothing adduced from the cross-examination of Steinberg by Patti to change my conclusions as previously noted, and therefore adhere to my original recommendation that the allegation of the complaint with respect to the unsatisfactory review of Patti and the failure to give him a pay increase in 1979 should be dismissed.